TAN AH KOW & ANOR v. TAN CHAUI EN

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
IDRUS HARUN JCA
YEOH WEE SIAM J
[CIVIL APPEAL NO: A-02(NCVC)(W)-233-02-2017]
2 AUGUST 2017

CONTRACT: *Agreement – Sale and purchase agreement – Allegations of sale of land – Parties did not enter written agreement – Whether there was oral agreement – Whether acts/conduct of parties constituted oral agreement – Whether power of attorney constituted sale and purchase agreement – Contracts Act 1950, s. 30*

LAND LAW: *Sale and purchase – Agreement – Allegations of sale of land – Parties did not enter written agreement – Whether there was oral agreement – Whether acts/conducts of parties constituted oral agreement – Whether power of attorney constituted sale and purchase agreement – Contracts Act 1950, s. 30*

EVIDENCE: *Witness – Credibility of witness – Judge's assessment of demeanour of witnesses – Whether outweighed need to determine on balance of probabilities that plaintiff had discharged burden of proving case – Whether facts established from totality of evidence given due weight and importance*

The first appellant was the registered proprietor of three pieces of land ('the three lands') and the co-owner of 1/3 of undivided share of ten pieces of land ('the ten lands'). Without any written agreement, the first appellant allegedly sold the three lands and his 1/3 share in the ten lands ('the 13 lands') to his brother ('the respondent') at the purchase price of RM420,000 ('the purchase price'). After paying the full purchase price by way of cash instalments and contra with the sale price of motorcycles sold by the respondent to the first appellant, the respondent signed an irrevocable power of attorney ('POA'). Without the respondent's knowledge, the first appellant transferred the three lands to his wife ('the second appellant'). The ten lands remained intact. The respondent later lodged a private caveat ('the caveat') on the three lands and transferred the 1/3 share in the ten lands to himself. He commenced an action at the High Court against the appellants, seeking declaratory orders, *inter alia*, (i) that the transfer of the three lands from the first to second appellants were illegal and ought to be set aside; and (ii) that the respondent was the beneficial owner of the three lands. The appellants counterclaimed and sought orders that (i) the POA was null and void; (ii) that the first appellant retained power as the registered owner of three lands and was entitled to transfer the same to the second appellant; (iii) the transfer of the three lands to the second appellant was valid; (iv) the respondent re-transfers the 1/3 share in the ten lands to the first appellant;

A and (v) the respondent to remove the caveat. In allowing the respondent's claim and dismissing the appellants' counterclaim, the Judicial Commissioner ('the JC') held that (i) there was an oral sale and purchase agreement ('SPA') between the parties evinced by (a) the return of a surplus payment of RM5,316 by the first appellant to the respondent; (b) contra B payments with motorcycles supplied by the respondent to the first appellant's business; and (c) the POA signed by the first appellant which gave the respondent the right to deal with the 13 lands; and (ii) the conclusion reached mostly depended on the credibility and demeanour of the witnesses and the impression formed on her based on the believability of the evidence of the C witnesses. The respondent was very frank and consistent in his testimony while the first appellant was a very evasive witness. Hence, the present appeal.

Held (allowing appeal)
Per Yeoh Wee Siam J delivering the judgment of the court:

D **(1)** Based on the totality of evidence adduced before the High Court, there was no evidence of an oral agreement to sell the 1/3 share of the first appellant in the ten lands and the three lands, which were wholly-owned by the first appellant, to the respondent at a purchase price of RM420,000. The findings of the JC that there was full payment made E by the respondent to the first appellant were not supported by the evidence at all. The unilateral documents of the respondent purporting to show payments were of no probative value to prove actual payment by him towards the purchase price. (paras 21, 22 & 28)

F **(2)** Notwithstanding the fact that there was no evidence of any oral or written agreement between the respondent and the first appellant for the purchase of the 13 lands, the JC erroneously concluded that (i) the return of the alleged surplus payment of RM5,316 by the first appellant to the respondent and the contra payment with motorcycles supplied by the respondent to the first appellant's business were all proof of full payment G of the purchase price of the 13 lands; and (ii) any alleged contra payments with the supply of motorcycles by the respondent's business to the first appellant's business were payments towards the purchase price of the 13 lands when such payments were not made by the respondent personally to the first appellant personally but were instead H payments made in respect of business transactions. (para 16)

(3) The POA did not make any specific reference to the 13 lands, which were described as 'properties' in the recital of the POA. Furthermore, there was no mention in the POA of any valuable consideration being given by the respondent to the first appellant if indeed the purpose of I the POA was to serve as a SPA between the parties. Although the POA came under the ambit of the Powers of Attorney Act 1949, it was the

Contracts Act 1950 which applied in view of the respondent's contention that the POA could be treated as the alleged SPA reduced in writing. Therefore, the POA could not stand as it had vague terms and discrepancy of definitions. It was void for uncertainty, as provided under s. 30 of the Contracts Act 1950. The respondent had no right to use the POA, which was not an SPA, to transfer the first appellant's 1/3 share in the ten lands to himself. (paras 38, 39, 40 & 44)

(4) The JC was swayed by her assessment of the demeanour of the first appellant and the respondent as witnesses. Although demeanour and credibility are important in determining which of the two versions of the parties could be believed and accepted, the JC should, first of all, determine on a balance of probabilities whether the respondent had discharged the burden of proving his case. The demeanour and credibility of witnesses should not be accorded such disproportionate weight by the JC to the extent of ignoring and not giving due weight and importance to the facts established from the totality of evidence. The JC erred in making her decision mainly based on the demeanour of the first appellant and the JC's perception of the lack of credibility of the first appellant. (paras 17 & 20)

Bahasa Malaysia *Headnotes*

Perayu pertama adalah pemilik berdaftar tiga bidang tanah ('tiga tanah') dan pemilik bersama 1/3 bahagian tidak berbahagi sepuluh bidang tanah ('sepuluh tanah'). Tanpa apa-apa perjanjian bertulis, perayu pertama dikatakan menjual tiga tanah dan 1/3 bahagiannya dalam sepuluh tanah tersebut ('13 tanah') kepada saudara lelaki kandungnya ('responden') dengan harga belian sebanyak RM420,000 ('harga belian'). Selepas membayar penuh harga belian melalui ansuran tunai dan kontra dengan harga jualan motosikal yang dijual oleh responden kepada perayu pertama, responden menandatangani surat kuasa wakil ('SKW') yang tidak boleh ditarik balik. Tanpa pengetahuan responden, perayu pertama memindah milik tiga tanah tersebut kepada isterinya ('perayu kedua'). Sepuluh tanah lagi kekal tidak terjejas. Responden seterusnya memfailkan kaveat persendirian ('kaveat') atas tiga tanah tersebut dan memindah milik 1/3 bahagian dalam sepuluh tanah lagi kepada dirinya. Dia memulakan tindakan di Mahkamah Tinggi terhadap perayu-perayu, memohon perintah pengisytiharan, antara lain, (i) pindah milik tanah oleh perayu pertama kepada kedua tidak sah dan wajar diketepikan; dan (ii) responden adalah pemilik benefisial tiga tanah tersebut. Perayu-perayu menuntut balas dan memohon perintah (i) SKW tidak sah dan terbatal; (ii) Perayu pertama kekal berkuasa sebagai pemilik berdaftar tiga tanah ini dan berhak memindah milik ketiga-tiganya kepada perayu kedua; (iii) pindah milik tiga tanah tersebut kepada perayu kedua sah; (iv) responden memindah milik semula 1/3 bahagian dalam sepuluh tanah tersebut kepada perayu pertama; dan (v) agar responden menyingkirkan kaveatnya.

Membenarkan tuntutan responden dan menolak tuntutan balas perayu-perayu, Pesuruhjaya Kehakiman ('PK') memutuskan (i) terdapat perjanjian jual beli ('PJB') secara lisan antara pihak-pihak yang terbukti melalui (i) pemulangan bayaran lebihan sebanyak RM5,316 oleh perayu pertama kepada responden; (b) bayaran kontra dengan motosikal yang dibekalkan oleh responden kepada perniagaan perayu pertama; dan (c) SKW yang ditandatangani oleh perayu pertama memberi responden hak untuk berurusan dengan 13 tanah; dan (ii) kesimpulan yang dicapai kebanyakannya bersandar pada kredibiliti dan perilaku saksi-saksi dan tanggapan beliau terhadap mereka berdasarkan kebolehpercayaan keterangan saksi-saksi. Responden sangat jujur dan konsisten dalam keterangannya manakala perayu pertama seorang saksi bersifat mengelak. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Yeoh Wee Siam H menyampaikan penghakiman mahkamah:

(1) Berdasarkan keseluruhan keterangan yang dikemukakan di Mahkamah Tinggi, tiada keterangan tentang perjanjian lisan untuk menjual 1/3 bahagian perayu pertama dalam sepuluh tanah tersebut dan tiga lagi tanah, yang dimiliki sepenuhnya oleh perayu pertama, kepada responden dengan harga belian berjumlah RM420,000. Dapatan PK bahawa terdapat bayaran penuh oleh responden kepada perayu pertama tidak disokong keterangan sama sekali. Dokumen-dokumen unilateral oleh responden yang bertujuan menunjukkan bayaran-bayaran tidak mempunyai nilai probatif untuk menunjukkan dia membuat bayaran harga belian.

(2) Walaupun hakikatnya tiada keterangan tentang apa-apa perjanjian lisan atau bertulis antara responden dan perayu pertama bagi pembelian 13 tanah, PK terkhilaf dalam memutuskan (i) pemulangan bayaran lebihan berjumlah RM5,316 oleh perayu pertama kepada responden dan bayaran kontra dengan motosikal yang dibekal oleh responden kepada perniagaan perayu pertama adalah bukti bayaran penuh harga belian 13 tanah tersebut; dan (ii) apa-apa dakwaan bayaran kontra dengan bekalan motosikal oleh perniagaan responden kepada perniagaan perayu pertama adalah bayaran harga belian 13 tanah sedangkan bayaran-bayaran demikian tidak dibuat oleh responden secara peribadi kepada perayu pertama secara peribadi tetapi sebenarnya bayaran transaksi perniagaan.

(3) Surat kuasa wakil tersebut tidak membuat apa-apa rujukan terhadap 13 tanah tersebut, yang diterangkan sebagai 'hartanah' dalam sebutan permulaan SKW. Tambahan lagi, tidak disebut dalam SKW tentang apa-apa balasan bernilai yang diberi oleh responden kepada perayu pertama jika SKW sememangnya bertujuan digunakan sebagai PJB antara pihak-pihak. Walaupun SKW terangkum bawah Akta Surat

Kuasa Wakil 1949, yang terguna pakai adalah Akta Kontrak 1950 kerana responden menghujahkan SKW boleh dianggap sebagai PJB bertulis. Oleh itu, SKW tidak sah kerana mengandungi terma-terma kabur dan definisi-definisi bercanggah. Surat kuasa wakil tidak sah atas sebab ketidakpastian, seperti yang diperuntukkan bawah s. 30 Akta Kontrak 1950. Responden tiada hak menggunakan SKW, yang bukan PJB, untuk memindah milik 1/3 bahagian perayu pertama dalam sepuluh tanah tersebut kepada dirinya sendiri.

(4) Pesuruhjaya Kehakiman terkhilaf dalam penilaian beliau tentang perilaku perayu pertama dan responden sebagai saksi. Walaupun perilaku dan kredibiliti penting dalam memutuskan mana-mana, antara dua versi, pihak-pihak yang boleh dipercayai dan diterima, PK sepatutnya, terlebih dahulu, memutuskan atas imbangan kebarangkalian sama ada responden telah melepaskan bebannya dalam membuktikan kesnya. Perilaku dan kredibiliti saksi-saksi tidak patut diberi pemberatan berat sebelah oleh PK hingga tahap mengabaikan dan tidak memberi pemberatan dan kepentingan pada fakta-fakta yang dibuktikan berdasarkan keseluruhan keterangan. Pesuruhjaya Kehakiman terkhilaf dalam keputusan beliau yang khusus berdasarkan perilaku perayu pertama dan tanggapan beliau tentang kekurangan kredibiliti perayu pertama.

Case(s) referred to:

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Malaysia Building Society Bhd v. Johore Mining and Stevedoring Company Sdn Bhd & Anor [2004] 5 CLJ 82 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 30
Evidence Act 1950, ss. 101, 102, 103
National Land Code, s. 340
Powers of Attorney Act 1949, s. 6

For the appellants - Wan Azmir Wan Majid, Emelia Iszeham & Caleb Goh Hern-Ee (Pupil in Chambers); M/s Hafarizam Wan & Aisha Mubarak

For the respondent - Mohamed Hanipa Maidin & Aminuddin Zulkipli; M/s Amin Amirul & Partners

[Editor's note: Appeal from High Court, Ipoh; Civil Suit No: 22NCVC-138-12-2015 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Yeoh Wee Siam J:

Introduction

B **[1]** This is an appeal by the defendants/appellants ("appellants") regarding the decision of the learned Judicial Commissioner ("JC") in the Ipoh High Court, dated 13 March 2017, in allowing the claim of the plaintiff/respondent ("respondent") against the appellants, and dismissing the appellants' counterclaim against the respondent, with costs of RM20,000 subject to payment of the allocatur fee.

C

Background Facts

[2] The respondent and the first appellant are brothers. At the material time, the first appellant was the registered proprietor of three disputed lands namely GM 3249 Lot 2120, GM 3250 Lot 2121 and GM 3251 Lot 2122 D ("the three pieces of land"), and co-owner of 1/3 undivided share ("1/3 share") of ten other pieces land, namely GM 2725 Lot 2041, GM 1579 Lot 2043, GM 1578 Lot 2040, GM 1577 Lot 2039, GM 1580 Lot 2044, GM 1581 Lot 2042, GM 1584 Lot 2021, GM 1585 Lot 2022, GM 2726 Lot 2023, GM 1575 Lot 2024 ("the ten pieces of land"), all of which lands are E situated at Mukim Slim Tempat Sungei Sempa in the District of Muallim, Perak.

[3] The respondent alleged that sometime in 2003, without any written agreement, the first appellant had agreed to sell and the respondent had agreed to buy all the three pieces of land and the first appellant's 1/3 share F in the ten pieces of land at a total purchase price of RM420,000. ("purchase price") (the three pieces of land and the first appellant's 1/3 share in the ten pieces of land are hereinafter collectively referred to as "the 13 pieces of land").

[4] The respondent alleged that he had paid the full amount of the G purchase price for all the 13 pieces of land by way of cash instalments, and contra with the sale price of motorcycles sold by the respondent to the first appellant, starting from 2003 until 2005.

[5] The respondent contended that after he had paid fully the purchase price for the 13 pieces of land to the first appellant, on 25 July 2006 the first H appellant signed an irrevocable power of attorney ("PA") (exh. 1, RR Bhg C Jld 4/4 pp. 381-388) which was witnessed by an advocate and solicitor, SP1. The PA was duly registered at the Ipoh High Court.

[6] Without the knowledge of the respondent, on 1 July 2015 the first appellant transferred the three pieces of land to the second appellant, who is I the first appellant's wife, without any valuable consideration, but for love and affection. However, the first appellant did nothing to the ten pieces of land.

[7] On 9 July 2015, the respondent lodged a private caveat ("caveat") on the three pieces of land. Besides that, on 28 July 2015 and 31 July 2015, the respondent transferred the first appellant's 1/3 share in the ten pieces of land to himself.

[8] On 18 November 2015, the Ipoh High Court ordered that the caveat be maintained until the disposal of the respondent's suit.

[9] On 9 January 2017, the learned JC allowed the respondent's claim as stated in para. 16 of the statement of claim ("SOC"), and dismissed the appellants' counterclaim.

The Respondent's Claim

[10] In para. 16 of the SOC [(RR Bhg A Jld.1/4) pp. 22 - 30 at pp. 29 & 30], the respondent applied for the following orders:

(i) Perintah Pengisytiharan bahawa pindahmilik hartanah-hartanah GM 3249 Lot 2120, GM 3250 Lot 2121 dan GM 3251 Lot 2122, kesemuanya di Mukim Slim, Daerah Batang Padang, Negeri Perak kepada Defendan Kedua adalah tidak sah dan pendaftaran pindahmilik tersebut telah dibuat dengan bersandarkan instrument pindahmilik yang tidak lengkap;

(ii) Dalam keadaan perintah (a) dibenarkan, satu perintah bahawa pindahmilik tersebut diketepikan;

(iii) Satu Perintah pengisytiharan bahawa Plaintif adalah pembeli yang sah dan pemilik benefisial hartanah-hartanah tersebut;

(iv) Satu Perintah yang memerintahkan Defendan Pertama untuk menandatangani Borang 14A dan dokumen-dokumen pindahmilik berkenaan yang lain bagi tujuan memindahmilikkan hartanah-hartanah tersebut kepada Plaintif;

(v) Secara alternative, jika Defendan Pertama gagal mematuhi perintah dalam perenggan (iv) diatas dalam tempoh empat belas hari dari tarikh ia diarahkan, Pentadbir Tanah dan Daerah Batang Padang/ Slim River diberi kuasa untuk menandatangani Borang 14A tersebut dan lantas menyempurnakan secara sah pindahmilik tersebut;

(vi) Kos atas dasar peguamcara klien;

(vii) Perintah atau relif-relif lain yang difikirkan adil dan suaimanfaat untuk diberikan oleh Mahkamah Yang Mulia ini.

The Appellants' Counterclaim

[11] In the appellants' counterclaim against the respondent in the re-amended defence and counterclaim ("counterclaim") [RR Bhg A Jld 1/4 pp. 31-48 at pp. 44-47 para. 20(a)-(q)], the appellants applied, *inter alia*, for the following orders:

(1) A declaration that the PA is null and void;

(2) In the alternative, a declaration that the PA was not given for a valuable consideration and not irrevocable;

A (3) A declaration that the 1st Appellant retains the power as registered owner of the 3 pieces of land and is entitled to transfer the 3 pieces of land to the 2nd Appellant;

(4) In the alternative, a declaration that the 1st Appellant did not lose the power to manage and to transfer the 3 pieces of land despite
B the existence of the PA;

(5) A declaration that the transfer of the 3 pieces of land by the 1st Appellant to the 2nd Appellant is valid and the 2nd Appellant remains as the registered proprietor of the 3 pieces of land;

(6) An Order that the Respondent re-transfers the 1st Appellant's 1/3
C share in the 10 pieces of land to the 1st Appellant;

(7) An Order that the Caveat lodged by the Respondent on the 3 pieces of land be removed and invalidated immediately; and

(8) An Order for damages to be assessed.

D **The Decision Of This Court**

[12] On 11 May 2017, after having heard the submissions of respective learned counsel and perused the records of appeal, this court made a unanimous decision. We found merits in the appeal. Accordingly, we allowed the appeal with costs and set aside the order of the High Court in
E regard to the respondent's claim, and allowed the appellants' counterclaim. We fixed agreed costs at RM20,000 subject to payment of the allocatur fee. The deposit is to be refunded to the appellants.

[13] Consequently, learned counsel for the appellants withdrew their application for stay in encl. 5a which was fixed for hearing on 25 May 2017.
F We therefore struck off encl. 5a with no order as to costs.

Grounds For Our Decision

No Agreement To Sell The 13 Pieces Of Land

[14] The learned JC, in her judgment (RRT pp. 11-23) at para. [17] stated
G that learned counsel for the respondent had conceded that there was no formal sale and purchase agreement ("SPA") signed between the respondent and the first appellant. However, the learned JC went on to conclude that there was an oral SPA between the parties. This is what she stated in the same paragraph:

H

> ... the parties had acted in such a way to support the contention there was in fact an oral sale and purchase agreement between them with the following acts:
>
> (a) The surplus of payment in the amount of RM5,316.00 which the 1st
I defendant had returned back to the 1st plaintiff. This can be gathered from the evidence of SP2 that SD1 had deposited RM5,316.00 into his account [exhibit P31-(bank in slip)].

(b) Even though the said contra (motorcycles) were made to a business (sole proprietorship), but the said business belongs to the 1st defendant and hence the 1st defendant and the business are one and the same entity. And the 1st defendant didn't deny receiving all those motorcycles.

(c) After all the said payment were made in full, the 1st defendant had signed an irrevocable Power of Attorney ("PA") giving the plaintiff the right to deal with all the above 13 pieces of land.

The learned counsel submitted that from the above acts, the 1st defendant has constructively admitted that payment of RM420,000.00 was indeed received from the plaintiff.

[15] The learned JC relied on the case of *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498 per Gopal Sri Ram JCA (delivering the judgment of the court) where he held:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant and acceptance by the plaintiff, and there was consideration, certainty of parties, certainty of price and property. Also, there were the unequivocal acts of part performance by the plaintiff which were referable to an existing contract between the parties … Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document … The defendant's own evidence that the defendant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties pointed to the formal agreement being an unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract ...

[16] Notwithstanding the fact that there was no evidence of any oral or written agreement between the respondent and the first appellant for the purchase of the 13 pieces of land, the learned JC erred by concluding that that return of the alleged surplus payment of RM5,316 by the first appellant to the respondent, and the contra payment with motorcycles supplied by the respondent to the first appellant's business (and not to the first appellant personally) are all proof of full payment of the purchase price of the 13 pieces of land. The learned JC erred by concluding that any alleged contra payments with the supply of motorcycles by the respondent's business/sole proprietorship ("business enterprise") to the first appellant's business enterprise are payments towards the purchase price of the 13 pieces of land when such payments were not made by the respondent personally to the first appellant personally, but instead payments were made in respect of business transactions.

[17] We observe that throughout her judgment, the learned JC was swayed by her assessment of the demeanour of the first appellant and the respondent as witnesses before her. She stated the following:

> [20] I find that the plaintiff was very frank and consistent while giving his evidence in court. When he was asked why didn't he entered a normal SPA agreement with the 1st defendant if he truly has bought the thirteen (13) pieces of land from the 1st defendant, the plaintiff was very frank when he said that was to avoid paying tax.
>
> ...
>
> [22] On the other hand, I find SD1 to be a very evasive witness. He admitted that he is the sole proprietor of Syarikat Motor Lee Hin. According to SD1 he gave his father money to pay for the 3 pieces of land and his father gave the right (beri kuasa) to him and his brothers (3 brothers including the 1st defendant). When he was further crossed that he can't be the only person who has paid for the land, SD1 took the easy way out and said he can't remember. SD1 admitted that he knew the titles to the 3 pieces of land was with the plaintiff but he nevertheless lodged a police report (exhibit P34) to say that the title to the three pieces of land was lost. When it was put to him that he lied in his report, SD1 disagreed. When he was asked regarding the payment of RM5,316 which the plaintiff alleged as a surplus returned by him, SD1 answered that he can't remember. Regarding the invoice and the supply of motorcycles, SD1 admitted that the name on the invoice was his business but he denied ever receiving the motorcycles. His inconsistency and evasive demeanour during the giving of his evidence affect his credibility as a witness.
>
> [23] I find that SD1 was very evasive and not consistent in giving evidence. For example, when it was put to him that even though he admitted and knew that the titles to the three (3) pieces of land was with the plaintiff but he nevertheless sought to manipulate the system and proceeded to lodge a police report claiming the titles were lost and with that report he secured copies of the required titles to enable him to transfer the three pieces of land to his wife. On this issues alone it is clear that SD1 is not a credible nor a reliable witness.
>
> [24] **In this case, the conclusions reached mostly depended on the credibility and demeanour of the witnesses and the impression formed by me based on the believability of the evidence of the witnesses**. I find that SD1 admitted that he had transferred the three pieces of land to his wife 9 years after executing the said PA in favour of the plaintiff. In the circumstances I hold that there was in fact an oral SPA between the plaintiff and the 1st defendant. I hold so because the titles of the thirteen (13) pieces of land were given to the plaintiff as admitted by the 1st defendant. The said PA was signed 3 years after the full payment (by cash/contra) was made to the 1st defendant. This fact supports the contention of the plaintiff that the said PA was signed after the full payment was made. (emphasis added).
>
> (Note: SD1 refers to the 1st Appellant).

[18] Regarding paras. [22] and [23] of the judgment of the learned JC, we are of the view that the learned JC did not have adequate judicial appreciation of the facts. According to the evidence of the first appellant and para. 34 of his re-amended defence (RR Bhg A Jld 1/4 p. 34), the first appellant had gone to see the respondent to ask for the land titles of the three pieces of land. However, when he was informed by the respondent that the land titles were not with him, the first appellant then lodged a police report to enable him to apply to the Land Office for the duplicate titles of the three pieces of land. Thus, it was wrong of the learned JC to conclude that on this issue alone the first appellant is not a credible nor a reliable witness.

[19] As for the first appellant's answer during cross-examination that he could not remember if he was the only one who had paid for the three pieces of land, we do not think that based on that answer, the learned JC should form the opinion that the first appellant is not a credible witness. The more important fact that the learned JC ought to have considered is that in the land titles, the first appellant is the registered owner of the three pieces of land and that is not disputed by the respondent.

[20] Having considered the judgment of the learned JC, we are of the view that the learned JC erred in making her decision based mainly on the demeanour of the first appellant, and the learned JC's perception of the lack of credibility of the first appellant. We agree that demeanour and credibility are important in determining which of the two versions of the parties can be believed and accepted. However, we are of the view that the trial judge should first of all determine, on a balance of probabilities, whether the plaintiff has discharged the burden of proving his case. This will then be considered by the trial judge, and taking into account at the same time the demeanour and credibility of the witnesses. The demeanour and credibility of witnesses should not be accorded such disproportionate weight by the trial judge to the extent of ignoring and not giving due weight and importance to the facts established from the totality of evidence.

[21] We agree with the submission of learned counsel for the appellants that based on the totality of the evidence adduced before the High Court, there is no evidence of an oral agreement to sell the 1/3 share of the first appellant in the ten pieces of land and the other three pieces of land, which were wholly-owned by the first appellant, to the respondent at a purchase price of RM420,000.

[22] In our considered view, the findings of the learned JC that there was full payment made by the respondent to the first appellant are not supported by evidence at all.

[23] In para. 8 of the SOC, the respondent pleaded that he had made the payment to the first appellant towards the purchase price of RM420,000 for the purchase of the 13 pieces of land as follows:

Bil	Tarikh	Jumlah (RM)/Invois
1	27/02/2003	RM30,000.00
2	06/03/2003	RM30,000.00
3	11/04/2003	RM40,000.00
4	19/05/2003	RM10,000.00
5	16/06/2003	RM10,000.00
6	15/07/2003	RM10,000.00
7	15/08/2003	RM10,000.00
8	23/09/2003	RM10,000.00
9	15/10/2003	RM10,000.00
10	24/11/2003	RM10,000.00
11	12/12/2003	RM10,000.00
12	08/03/2004	RM12,000.00
13	10/03/2004	RM8,000.00
14	08/03/2005	RM35,839.00/INVOIS 1708, 1709, 1710, 1714 & 1732
15	24/03/2005	RM23,839.00/INVOIS 1739
16	25/03/2005	RM27,954.00 INVOIS 1740
17	29/03/2005	RM20,000.00
18	20/04/2005	RM23,861.00/INVOIS 1741
19	20/04/2005	RM6,578.00/INVOIS 1742
20	04/05/2005	RM10,000.00
21	04/05/2005	RM28,738-00/INVOIS 1744
22	05/06/2005	RM10,000.00
23	05/07/2005	RM10,000.00
24	05/07/2005	RM28,507.00/INVOIS 1756
25	09/09/2005	RM5,316.00 (dipulangkan kepada Plaintif)
	JUMLAH	RM420,000.00

[24] The learned JC erred by not considering the fact that the bank statements exhibited by the respondent are actually not the bank statements of the respondent personally, but of the respondent's business enterprise, namely Lee Hin Motor Auto Parts Enterprise (RR Bhg C Jld 4/4 pp. 357, 359, 360, 370, 373,376 and 377). Therefore, the bank statements do not

reflect the respondent's personal bank transactions. Nowhere in the bank statements is it stated that the cheque payments by Lee Hin Motor Auto Parts Enterprise are paid to the first appellant for the respondent's purchase of the 13 pieces of land.

[25] The respondent exhibited some invoices to prove his payments to the first appellant (exhs. P2(a) to P31) for the purchase of the 13 pieces of land. The respondent contended that he had also paid the first appellant for the said purchase by way of contra with the sale of motorcycles by the respondent to the first appellant. However, the learned JC failed to consider that the invoices by themselves do not prove payment of the purchase price to the first appellant. In commercial transactions, invoices are billing documents, but they are not receipts and thus cannot be used as proof of payment.

[26] The respondent did not produce any other contemporaneous documents to support his claim based on the invoices. There is no proof of any purchase order given by the first appellant to the respondent. The first appellant denied having received any motorcycles by way of contra from the respondent. The learned JC further failed to take note of the fact that there were no delivery orders produced by the respondent to show that the first appellant had taken delivery of the motorcycles from the respondent. Thus, it is clear that the respondent was unable to prove his payment to the first appellant by contra with the motorcycles as he had pleaded in the seven items stated as "invois" in the above table in para. 8 of the SOC.

[27] There is therefore no proof at all by the respondent that from 27 February 2003 to 10 March 2004 he had paid RM200,000, and from 24 March 2005 to 5 July 2005 he had paid RM50,000 in the form of cheques, and RM170,000 in the form of contra with motorcycles supplied to the first appellant for the purchase price of the 13 pieces of land.

[28] We agree with the submission of learned counsel for the appellants that the unilateral documents of the respondent purporting to show payments are of no probative value to prove actual payment by him of the purchase price.

The PA Is Void For Uncertainty

[29] In the absence of a written SPA, apart from relying on the purported oral agreement to purchase the 13 pieces of land from the first appellant, the respondent also relied on the PA (exh. P1, RR Bhg C Jld 4/4 pp. 381-388) executed by the first appellant three years after the alleged full payment of the purchase price of the 13 pieces of land to the first appellant.

[30] The first appellant contended that he had executed the irrevocable PA to appoint the respondent as his attorney for the 13 pieces of land since he was busy with his business in Kuala Lumpur, and the lands are in Slim River where the respondent was residing. The first appellant's intention for executing the PA is to get the assistance of the respondent to manage the

A lands. The first appellant did not intend to sell the 13 pieces of land to the respondent. In any case, the first appellant contended that the purported purchase price of RM420,000 for the 13 pieces of land is far below the actual value of the lands. In our view, this evidence ought to have been considered and given due weight by the learned JC.

B **[31]** The appellants contended that the PA cannot be accepted as an SPA for lack of valuable consideration. Without any valuable consideration, the PA is also not an irrevocable PA which allows the respondent to transfer the 13 pieces of land to himself.

C **[32]** In *Malaysia Building Society Bhd v. Johore Mining and Stevedoring Company Sdn Bhd & Anor* [2004] 5 CLJ 82, the High Court has defined consideration to be any right, interest, profit or benefit on one party, or a detriment, loss or responsibility given or undertaken by the other.

[33] Section 6 of the Powers of Attorney Act 1949 provides as follows:

D Powers Of Attorney Given for valuable Consideration

6. (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser -

E (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; … .

[34] The respondent, however, contended that the PA given by the first appellant to him in respect of the 13 pieces of land is irrevocable and he had F acted lawfully under the PA to transfer the lands to himself after having paid fully the purchase price.

[35] We note that the recital of the PA at its first page states that the first appellant appoints the respondent to be his attorney "only in respect of the following properties". Thereafter, the 13 pieces of land were listed in paras. G (a) to (m) of the PA.

[36] Paragraph 21 of the PA states as follows:

21. This Power of Attorney under all circumstances is IRREVOCABLE as the Attorney/Donee has purchased **the said Land** for a valuable H consideration and is irrevocable also in the event of death. (emphasis added).

[37] The question is whether the 13 pieces of land constitute valuable consideration under the PA to render the PA irrevocable, and for the PA to be accepted as an SPA.

I **[38]** We observe that the words "the said land" in para. 21 of the PA do not make any specific reference to the 13 pieces of land which have been described as "properties" in the recital of the PA. Furthermore, there is no

mention in the PA of any valuable consideration being given by the respondent to the first appellant if indeed the purpose of the PA is to serve as an SPA between the parties, as alleged by the respondent. A

[39] We agree with the submission of learned counsel for the appellants that although the PA comes under the ambit of the Powers of Attorney Act 1949, it is the Contracts Act 1950 which applies here in view of the respondent's contention that the PA can be treated as the alleged SPA reduced in writing. B

[40] Therefore, as submitted by learned counsel for the appellants, the PA cannot stand as it has vague terms and discrepancy of definitions. It is void for uncertainty. This is clearly provided in s. 30 of the Contracts Act 1950 as follows: C

> Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[41] Due to the uncertainty of its terms, in our view, the PA cannot be accepted as an SPA. D

[42] We further find that the learned JC erred by not considering that if it is true, as alleged by the respondent, that the first appellant gave the PA to the respondent after the respondent had paid fully the purchase price, then it is highly improbable and hard to believe that the respondent did nothing for nine years after he was appointed as attorney under the PA to transfer the ten pieces of land to himself. He only did so after he had discovered that the first appellant had transferred the three pieces of land to the second appellant. E

[43] The respondent has therefore failed to prove that the PA is evidence of the alleged SPA that was agreed upon by both parties, or that the SPA is legally binding at all. The learned JC erred in deciding that the alleged SPA could be inferred from the circumstances surrounding the PA. The learned JC should not have accepted the oral evidence of SP1, the advocate and solicitor who attested the PA, that "the said land" refers to the 13 pieces of land. In our view, the PA ought to be construed strictly and squarely within the same document itself without taking into account any parole evidence, or other extraneous evidence, in particular, the oral evidence of SP1 in interpreting the provisions of the PA based on her own explanation or opinion. Therefore, the learned JC erred in dismissing the appellants' counterclaim to declare the PA null and void being given for no valuable consideration. F G H

[44] Since there is no proof of full payment of the purchase price, the respondent has no beneficial interest in the 13 pieces of land. The respondent has no right to use the PA, which is not an SPA, to transfer the first appellant's 1/3 share in the ten pieces of land to himself. I

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Conclusion

[45] On the whole, the learned JC erred by not considering that in the absence of any agreement, whether oral or in writing, by the first appellant to sell the 13 pieces of land to the respondent, and without any concrete evidence of payment by the respondent to the first appellant of the purchase price for the 13 pieces of land, the respondent has not discharged his burden of proving his case under ss. 101, 102 and 103 of the Evidence Act 1950. The learned JC also failed to consider that without proof of the respondent's claim, the first appellant, who is the registered proprietor of the three pieces of land, is entitled to transfer the same to the second appellant. Pursuant to such valid transfer by the first appellant, the second appellant has now obtained indefeasibility of title to such lands under s. 340 of the National Land Code.

[46] For the above reasons, we therefore find merits in the appeal which warrant appellate intervention. In the premises, we accordingly allowed the appeal with costs.

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